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Summary record of the 938th meeting
Held at Headquarters, New York, on Tuesday, 26 June 2012, at 3 p.m.

Chair: Mr. Wiwen-Nilsson (Vice-Chair) ..... (Sweden)

Contents

Finalization and adoption of a Guide to Enactment of the UNICTRAL Model Law on Public Procurement (*continued*)

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Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/745, A/CN.9/754 and Add.1 and 2, A/CN.9/WG.I/WP.79 and Add.1-19)

Document A/CN.9/WG.I/WP.79/Add.5

1. **Ms. Nicholas** (Secretariat) drew attention to paragraph 19 of the report of Working Group I (Procurement) on its twenty-first session (A/CN.9/745), which described the changes agreed upon by the Working Group to document A/CN.9/WG.I/WP.79/Add.5. The Secretariat had not yet finalized the significant redrafting of paragraphs 21 and onwards, relating to article 16, requested by the Working Group.

2. **Mr. Wallace** (United States of America), referring to paragraph 30 of addendum 5, reiterated his delegation's view that small and medium enterprises (SMEs) could not easily obtain tender securities and that requests for their provision might discourage them from participating in procurement proceedings.

3. The Working Group had requested that the first sentence in paragraph 30 of the draft Guide be reformulated in more neutral terms so as to avoid conveying any message that tender securities were necessary or recommended for some types of procurement. His delegation did not agree that tender securities facilitated participation by SMEs in public procurement, while recognizing that tender securities might allay a procuring entity's concerns as to the qualification and capacities of suppliers or contractors in the procurement proceedings.

4. **Ms. Nicholas** (Secretariat) said that the Secretariat's understanding of the Working Group's discussion on tender securities was that it wished to see a balanced commentary for article 17 of the Model Law, presenting the advantages and disadvantages of tender securities. The reference to those advantages and disadvantages in the particular context of SME participation was in parentheses in the text of the Working Group's report and the Commission could therefore decide whether or not to include it.

5. **The Chair** asked whether, in that light, subparagraph (j) could be redrafted to remove any reference to SMEs.

6. **Mr. Fruhmann** (Austria) insisted that a more balanced explanation of the advantages and disadvantages of tender securities should be reflected in the draft Guide.

7. **Ms. Nicholas** (Secretariat), drawing attention again to paragraph 30 of addendum 5, said that the issue of tender securities had originally arisen with respect to electronic reverse auctions (ERAs). There was no specific reference to SMEs in article 17, but subparagraph (j) set out the possible advantages and disadvantages for them. She also drew attention to the final sentence of paragraph 35 of addendum 5, where the matter was concluded. She wondered whether that would satisfy the Commission.

8. **Mr. Grand d'Esnon** (France) said that in the Working Group a majority had favoured requesting the provision of tender securities but some countries, including his own, had expressed their opposition. The Secretariat should, therefore, reword the first sentence in paragraph 30 in more neutral or objective terms.

9. **The Chair** said that subparagraph 19 (j) seemed to present a balanced reflection of the discussions on the advantages and disadvantages of tender securities. He had doubts, however, about the use of the word "jurisdictions"; it might be more accurate to talk about "situations" instead. He asked the representative of France to clarify his objection to subparagraph 19 (j).

10. **Mr. Grand d'Esnon** (France) said that he objected to the impression created that requesting the provision of tender securities might have a favourable effect on SMEs. Moreover, the text suggested that tender securities were the norm. The Commission should not enter into a discussion of the advantages or disadvantages of tender securities for SMEs but the text should point out that both existed.

11. **Mr. Wallace** (United States of America) said that the way in which subparagraph 19 (j) was worded suggested that in some jurisdictions tender securities were favourable while in others they were negative. The balance could be struck simply by making it clear that in all jurisdictions tender securities could present both advantages and disadvantages.

12. **The Chair**, recalling that the effects of tender securities were not specific to SMEs, suggested deleting the references to both SMEs and jurisdictions. He took it that the Commission agreed to his

suggestion and wished to leave the redrafting to the Secretariat.

13. *It was so decided.*

14. **Mr. Wallace** (United States of America), referring to paragraph 41 of addendum 5, said that his delegation believed that the first sentence, listing a number of factors, was too sophisticated. He did not recall any discussion in the Working Group on the complicated issue of geographical factors, especially for pre-qualification proceedings. He suggested simplifying the sentence in question.

15. **Ms. Nicholas** (Secretariat) said that paragraph 41 should be read in conjunction with the preceding paragraph. Paragraph 40 introduced the issue of international publication, whereas paragraph 41 set out the kinds of factors to be assessed. Those factors were not straightforward, which was why the text was rather complicated.

16. **The Chair**, drawing attention to article 33 (4) of the Model Law, suggested that paragraph 41 should be left as it was. It was simply an explanation of the Model Law and added nothing to it.

17. **Mr. Wallace** (United States of America) said that he could accept the Chair's suggestion.

Document A/CN.9/WG.I/WP.79/Add.6

18. **Ms. Leblanc** (Canada) said that the term "justify" used in paragraph 6 of the addendum was inappropriate.

19. **Mr. Grand d'Esnon** (France) agreed with Canada, adding that the word "justification" in paragraph 7 would also have to be changed.

20. **The Chair** agreed that the term "justify" did not reflect the outcome of the discussions held.

21. **Ms. Leblanc** (Canada) suggested that the second sentence of paragraph 6 might be reworded to read: "The request should ask the supplier or contractor to clarify the basis upon which the price was determined and confirm any additional details in this respect that may be necessary to allow the procuring entity to conclude whether the supplier or contractor will be able to perform the procurement contract for the price submitted."

22. **The Chair** expressed concern that the proposed wording went too far.

23. **Mr. Wallace** (United States of America), agreeing with the Chair, said that paragraph 7 already alluded to the issue. Fears had been expressed that ERA procedures might drive prices down too far. Nevertheless, it would be unreasonable to ask the supplier or contractor to clarify the basis upon which the price was determined as that was confidential information. Unless the amendment suggested by the representative of Canada could be toned down it should be rejected.

24. **The Chair**, drawing attention to paragraph 20 of the Working Group's report, which addressed the issue of prices, said that the Secretariat might redraft paragraph 6 in the light of subparagraphs 20 (b), (c) and (d).

25. **Ms. Leblanc** (Canada) said that her delegation agreed in principle with the views expressed by the United States of America and the Chair and would happily leave it to the Secretariat to improve the wording of paragraph 6.

26. **Mr. Wallace** (United States of America) requested that the word "exhaustive" in paragraph 14 be deleted. The grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings for reasons not linked to qualification or to the content of a submission might be subject to changes over time and it would be impossible to provide an exhaustive list.

27. **Mr. Fruhmann** (Austria) said that in view of the title of article 21 the wording of paragraph 14 should remain unchanged.

28. **The Chair** suggested that "provide a list of the grounds" might be preferable wording.

29. **Mr. Grand d'Esnon** (France), expressing understanding for the concerns of the United States delegation, proposed replacing "exhaustive" with "complete" or "closed".

30. **The Chair**, noting the agreement to delete the word "exhaustive", said that the Secretariat would find a more satisfactory wording, possibly "the grounds" or "the sole grounds".

31. **Ms. Leblanc** (Canada), referring to paragraph 18, said that although the Working Group had discussed the definitions of the terms "unfair competitive advantage" and "conflict of interest", the text did not seem to offer additional clarity. In any case, States

should be left to define those terms under their domestic law and no definition should be necessary in the text.

32. **Mr. Imbachi Cerón** (Colombia) agreed that definitions of the terms mentioned by the representative of Canada should not be provided in the Guide; rather, it should be left to the competent national authorities to determine what the terms meant. There were many factors that determined unfair competitive advantage, including technical or economic superiority.

33. **The Chair** asked the delegate of Canada if she had taken paragraph 20 of the Working Group report into account, in particular footnote 6, which went into considerable detail on definitions.

34. **Ms. Leblanc** (Canada) said that she was simply seeking a clarification but it was her delegation's opinion that the terms should not be defined at all. She wanted to be sure that its opinion would be taken into account when the Guide was finalized.

35. **Ms. Nicholas** (Secretariat) said that the Commission was free to decide that neither term required a definition in the Model Law. In some countries, the judiciary might even interpret the terms on a case-by-case basis. However, the discussions held in the Working Group might help those countries so wishing to define the terms in their legislation.

36. **The Chair** said that subparagraph 20 (g) of the Working Group's report seemed to reflect the consensus satisfactorily.

37. **Ms. Miller** (World Bank) requested that the hyperlink in paragraph 48 to the World Bank's debarment system should be deleted as it was irrelevant to the issue at hand, namely debriefing.

38. **The Chair** said that the Secretariat would act on the World Bank's request.

39. **Mr. Mugasha** (Uganda) asked what would happen to the footnotes contained in the addenda, such as footnote 4 in addendum 6.

40. **The Chair** replied that all footnotes would be deleted in the final document and the text contained therein would be incorporated into the body of the Guide.

Document A/CN.9/WG.I/WP.79/Add.8

41. **Mr. Fruhmann** (Austria) said that the wording of paragraph 6 might be confusing as it referred to article 28 (1), whereas the addendum addressed later articles. He asked how the final text would be presented, bearing in mind the need for ease of comprehension.

42. **Ms. Nicholas** (Secretariat) said that the Working Group had instructed the Secretariat to group the commentaries for each procurement method together, which explained the layout of addendum 8. It might be clearer to revise the heading before paragraph 6 to read "Introduction to open tendering".

43. **The Chair** said that it might be more logical to change the order of paragraph 6, so that it began with the statement that there were no conditions for the use of open tendering. He suggested that the Secretariat could be tasked with ensuring that the final wording and layout were clear.

44. **Mr. Wallace** (United States of America) said that, in paragraph 11, the last phrase in parentheses, "with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be able to obtain the solicitation documents", posed a problem for his delegation. Such suppliers and contractors should be able to obtain the solicitation documents and the words "will not be able" were too strong.

45. **The Chair** agreed that suppliers or contractors excluded from participation in the procurement proceedings should be able to obtain the documents on request.

46. **Mr. Grand d'Esnon** (France) said that in many national systems, including France's, solicitation documents were circulated only to the successful candidates and were not made public. That should be reflected in the text, possibly with improved wording.

47. **The Chair** said that the Secretariat would see to it that the text struck the necessary balance by referring to the entitlement of suppliers or contractors excluded from participation in the procurement proceedings to obtain the solicitation documents under article 38.

48. **Mr. Wallace** (United States of America) said that, in the opinion of his delegation, the penultimate sentence of paragraph 24 was misleading. Once a tender had been received the submission of tenders

should be at the risk not of the suppliers or contractors but of the procuring entity.

49. **Ms. Nicholas** (Secretariat) said that the text would be redrafted to make it clear that it referred to cases of system failure before receipt of the tender by the procuring entity.

50. **The Chair** took it that the proposed solution was acceptable.

Document A/CN.9/WG.I/WP.79/Add.10

51. **Mr. Wallace** (United States of America) welcomed the reference in the introduction to articles of the Model Law in addition to the reference to chapters. For the sake of easier reading, it would be useful if that approach could be applied throughout the draft Guide

52. **The Chair** said that the Secretariat would act upon the United States suggestion.

Document A/CN.9/WG.I/WP.79/Add.13

53. **Mr. Zhao** Yong (China) asked why the definition of the terms "services" and "construction" had been deleted from the draft Guide, leading to a lack of clarity in addendum 13.

54. **Ms. Nicholas** (Secretariat) recalled that the Working Group and the Commission had decided, when revising the Model Law, that no distinction needed to be made between procurement for goods, services or construction. Therefore the term "subject matter of the procurement" was used consistently throughout the Model Law although references to goods, construction and services were made in the draft Guide wherever appropriate or necessary. The Working Group had explicitly ruled out defining the terms "services" and "construction" in the specific context of ERA, the subject of addendum 13. She added that paragraph 4 of addendum 3 referred to the definition of "subject matter of procurement" and contained descriptions of goods, construction and services, albeit based on the definitions given in the 1994 Model Law.

Document A/CN.9/WG.I/WP.79/Add.14

55. **Mr. Zhao** Yong (China), noting that the translation of the draft Guide into Chinese generally lacked accuracy, drew attention to a particularly serious mistake in addendum 14, namely the use of the Chinese word for "auction" to translate "ERA". They were, of course, quite different concepts and the error would result in considerable confusion when drawing up contracts in his country.

56. **The Chair** said that the Secretariat had taken note of the point raised by the representative of China.

57. **Mr. Wallace** (United States of America), recalling earlier problems with translation and interpretation, asked whether delegations might be accompanied by linguistic experts at meetings in order to avoid mistranslations in the future.

58. **Ms. Nicholas** (Secretariat) said that the Secretariat worked closely with the translation services on terminology. Translators always welcomed constructive comments from delegates.

Document A/CN.9/WG.I/WP.79/Add.16

59. **Mr. Fruhmann** (Austria) asked the Secretariat whether the draft Guide stated, in addendum 16 or elsewhere, that there was no obligation for the procuring entity to use a framework agreement if there was a risk of collusion.

60. **Ms. Nicholas** (Secretariat) confirmed that the draft Guide did so. She would provide the exact reference at a later stage.

61. **Mr. Wallace** (United States of America), referring to footnote 2, asked for clarification of the subparagraph in the Working Group's report to which it referred, namely 10 (d).

62. **Ms. Nicholas** (Secretariat) recalled that, in the lengthy discussion in the Working Group, it had been agreed that procuring entities would not be legally required at the outset of the procedure to set a minimum number of parties to a framework agreement. In fact, procuring entities should be encouraged at the outset of the procedure to consider whether or not setting a minimum number of parties to the framework agreement was appropriate according to the nature of the market. Where the procuring entity envisaged the possibility that a stated minimum number of parties might not be achieved, it should specify in the solicitation document the steps it would then take, which might include the possibility of concluding the agreement with a lower number of suppliers.

63. **Mr. Wallace** (United States of America), recalling that article 15 did not require a minimum number of parties to a framework agreement, said that

it was important to encourage best practices, such as setting a minimum number. However, explicitly allowing procuring entities to conclude the agreement with a smaller number of suppliers than the minimum set would be a bad practice.

64. **Ms. Nicholas** (Secretariat) reminded the Commission that the Working Group had decided to allow procuring entities to conclude a framework agreement with a lower number of suppliers, but the Commission could amend the text if it so wished.

65. **Mr. Grand d'Esnon** (France) said that the matter had already been discussed at length and should not be reopened. Where the procuring entity envisaged the possibility that the stated minimum number of parties to a framework agreement might not be achieved, the agreement could be concluded with a lower number of suppliers in order to prevent cancellation of the procurement, which would not be sensible.

66. **Mr. Fruhmann** (Austria) said that the current wording allowed if not for the best practice, then at least for second best. He agreed with France that it would be regrettable if a procurement exercise was cancelled because only two and not three parties, for example, could be found.

67. **Mr. Wallace** (United States of America) said that he had merely wished to raise the matter and, in the light of the discussion, could agree to the existing wording.

Document A/CN.9/WG.I/WP.79/Add.19

68. **Ms. Nicholas** (Secretariat) recalled that, in its report, the Working Group had asked the Secretariat to ensure consistency in the use of terminology throughout the draft Guide and to replace prescriptive wording with a discussion of the main issues arising and policy options to address them. She assured the Commission that the request would be met in full.

Concluding remarks

69. **Mr. Wallace** (United States of America) said that, in the concluding remarks of its report, the Working Group had taken note that the Guide would not contain a glossary of terms but that a similar document would be produced by the Secretariat in due course. In view of the importance of maintaining accurate glossaries, or similar documents, as well as the disbandment of the Working Group, he asked how the Secretariat planned to produce such a document and how it would be verified on an ongoing basis.

70. **Ms. Nicholas** (Secretariat) recalled that it had been decided by the Working Group and in intersessional consultations that it would be too complicated to annex a glossary proper to the draft Guide to Enactment. Instead, an informal explanatory document, possibly in the form of a detailed commentary, would be produced by the Secretariat in due course, on the basis of the Working Group's deliberations. As the Working Group's report stated, any other materials produced to assist in the enactment and use of the Model Law would be reviewed periodically and, should amendments be warranted, they would be presented to the Commission for its consideration on an informal basis from time to time.

The meeting rose at 5.45 p.m.